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Supreme Court of the United States

OCTOBER TERM, A. D. 1954.

No. 270

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

JOHN MARGEVICH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI, TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

OTIS LOWELL HASTINGS,
DRENNAN J. SLATER,
400 West Madison Street,
Chicago 6, Illinois.
Attorneys for Petitioner.

GERALD M. CHAPMAN,
JORDAN JAY HILLMAN,
Of Counsel.

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago.
Telephone: Financial 6-3958

INDEX.

PAGE

Report of opinions below 2

Jurisdiction 2

Question presented 3

Statutes involved 3

Statement of the case 5

Argument

I. The issue presented substantially and directly affects the measure of damage in Federal Employers' Liability Act cases, and constitutes a federal question of substance not heretofore determined by this Court 7

II. The court below decided the issue in a manner inconsistent with the basic principle that compensation in Federal Employers' Liability Act cases should equal but not exceed the extent of injury 9

Conclusion 19

Appendix 21

Table of Authorities.

Federal Authorities.

American Railway Express Co. v. Levee, 263 U.S. 19.... 2

Chesapeake & Ohio Railway Co. v. Gainey, 241 U.S. 494 ..... 8, 13

Chesapeake & Ohio Railway Co. v. Kelly, 241 U.S. 485 ..... 7, 8, 13, 14

Dow v. Humbert, et al., 91 U.S. 294 7

Employers' Liability Cases, 207 U.S. 463 8

Gulf, C. & S. F. Ry. Co. v. Moser, 275 U.S. 133 ..... 8, 14

Illinois Central R. Co. v. Crail, 281 U.S. 57 8

Louisville & Nashville R. R. Co. v. Holloway, 246 U.S. 525 ..... 13, 14

Market Street Railway Co. v. R. R. Comm., 324 U.S. 548 2

Miller v. Robertson, 266 U.S. 243 8

Milwaukee etc. R. R. Co. v. Arms et al., 91 U.S. 489 7

Second Employers' Liability Cases. 223 U.S. 1 8

Standard Oil Co. v. Southern Pacific Co., 268 U.S. 146 8

Wicker v. Hoppock, 6 Wall. 94 7

Chicago & North Western Ry. Co. v. Curl, 178 F. 2d 497 (8th Cir.) 16

Southern Pacific Co. v. Guthrie, 186 F. 2d 926 16

Stokes v. United States, 144 F. 2d 82 (2nd Cir.) 15

Wetherbee v. Elgin, Joliet & Eastern Ry. Co., 191 F. 2d 302 (7th Cir.) 18

Cole v. Chicago, St. P. M. & O. Ry. Co., 59 F. Supp. 443 16

Title 26 U. S. C. § 12 10

Title 26 U. S. C. §§ 22(a), 22(b)(5) 10, 15

Title 28 U. S. C. §§ 1257(3), 2101(c) 2

Title 45 U. S. C. §§51-60 3

38 Stat. 166 9

35 Stat. 65 8

34 Stat. 232 8

STATE AUTHORITIES.

Dempsey v. Thompson, 363 Mo. 339, 251 S.W. 2d 42 ..... 11, 15

Hall v. Chicago & North Western Ry. Co., 349 Ill. App. 175, 110 N.E. 2d 654 12

Hall v. Chicago & North Western Ry. Co., 1 Ill. App. 2d 552, 118 N.E. 2d 29 13

Smith v. Pennsylvania R. Co., 99 N.E. 2d 501 (Ct. of App. of Ohio) 16

Texas & N. O. R. Co. v. Pool, 263 S.W. 2d 582 (Tex. Ct. of Civ. App.) 16

Ill. Rev. Stats. - 1953, Ch. 110, §§ 199(2). 259.44 2

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vs.

JOHN MARGEVICH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI, TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

Petitioner, being aggrieved by an erroneous decision of the Appellate Court of Illinois, First District, concerning a novel question substantially affecting the measure of damages in all Federal Employers' Liability Act cases, prays for a writ of certiorari to issue so that this Court may review and reverse the decision of the aforesaid Appellate Court in the above entitled cause.

REPORTS OF OPINIONS BELOW.

The opinion of the Appellate Court is reported at 1 Ill. App. 2d 162 and 116 N.E. 2d 914, and is set forth in an appendix hereto.

The Superior Court of Cook County, being the trial court below, and the Illinois Supreme Court, which denied a petition for leave to appeal from the judgment of the Appellate Court, issued no written opinions.

Jurisdiction.

The judgment of the Appellate Court was entered on December 30, 1953 (R. 284), and a petition for leave to appeal from this judgment was denied by the Supreme Court of Illinois on May 18, 1954 (R. 293). Under Illinois law the failure of the Supreme Court to grant leave to appeal rendered the Appellate Court judgment final, and subject to no further review except by petition for rehearing in the Supreme Court, the filing of which petition is not mandatory. *Ill. Rev. Stats.* 1953, ch. 110, §§ 199 (2), 259.44. *Market Street Railway Co.* v. *Railroad Comm. of California,* 324 U. S. 548, 551.

This petition is filed within ninety days from the denial of the petition for leave to appeal. Accordingly, the jurisdiction of this Court to review the judgment of the Appellate Court by writ of certiorari is invoked under Title 28 U.S.C. §§ 1257(3) and 2101(c). See: *American Railway Express Co.* v. *Levee,* 263 U. S. 19, 20-21.

Question Presented.

This case involves an action for damages for personal injuries brought by the respondent, John Margevich, against the petitioner, Chicago and North Western Railway Company, under the Federal Employers' Liability Act, as amended (Title 45 U.S.C. §§ 51-60).

The sole question presented by this petition is whether a trial court commits reversible error in refusing to instruct the jury, when properly requested, concerning the applicability of the federal income tax to an amount awarded as damages for personal injuries.

Statutes Involved.

The only statute involved is the Federal Employers' Liability Act, Title 45 U.S.C. §§ 51-60. The only sections of this Act pertinent to the issue presented are Sections 1 and 6 (Title 45 U.S.C. §§ 51, 56). These sections are set out verbatim below:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect

or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." Title 45 U.S.C. § 51.

"No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States." Title 45 U.S.C. § 56.

Statement of the Case.

This action was brought under the Federal Employers' Liability Act, as amended (U.S.C. Title 45, Secs. 51-60), by a 66-year old car repairman in petitioner's employ for injuries suffered when he fell from a scaffolding while straightening a grabiron on a box car (R. 1a-4a, 6a). Respondent (plaintiff below) alleged that the petitioner (defendant below) was negligent in various respects (R. 1a-4a). Petitioner denied that it was guilty of any negligence and asserted that the sole proximate cause of the accident was respondent's own negligence (R. 4a-5a).

The jury rendered a verdict for respondent in the amount of $37,500 (R. 7a). This amount was reduced by a remittitur of $7,500 (R. 13a-14a). On appeal to the Appellate Court of Illinois, First District, the final judgment for respondent in the amount of $30,000 was affirmed (R. 272-284).

The following income tax instruction was requested by petitioner in the trial court (R. 245, 247):

> "You are instructed that under the present provisions of the Internal Revenue Code of the United States any amount paid plaintiff by defendant under a verdict of this jury is exempt from the payment of federal income taxes for the year of receipt of said amount, although the amount of any dividends, interest, gain, profits or income derived from any such amount paid plaintiff by defendant under a verdict of this jury would not be exempt from the payment of federal income taxes."

This instruction was refused (R. 247).

The trial court's error in refusing the instruction was assigned as a ground in support of petitioner's motion for new trial (R. 7a, 10a). Petitioner's motion was denied

(R. 14a). The propriety of the trial court's refusal of the instruction was argued before and passed on adversely to petitioner by the Appellate Court (App. 26-27).[1] No contention has been made that the refused instruction fails to state accurately and concisely the applicability of the federal income tax to damage awards.

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1 Other grounds for reversal of the trial court judgment, which were properly preserved in the record, were also argued and passed on by the Appellate Court (App. 22). Petitioner believes that the Appellate Court also erred in its disposition of these issues. These matters are not raised in this petition, however, because of petitioner's belief that the issue presented here is of such general importance in the administration of F.E.L.A. cases that it should not be obscured by any considerations limited to the facts of this particular case.

ARGUMENT.

I.

The issue presented substantially and directly affects the measure of damages in Federal Employers' Liability Act cases, and constitutes a federal question of substance not heretofore determined by this Court.

The stated purpose of the Federal Employers' Liability Act (Title 46 U.S.C. §§ 51-60), is to render railroads "liable in damages" for the personal injuries or deaths of railroad employees who are injured or killed while in the railroad's employ as a result of the railroad's negligence. The "proper measure of damage" in F.E.L.A. cases, as this Court stated in *Chesapeake & Ohio Ry. Co.* v. *Kelly*, 241 U. S. 485, 491, "must be settled according to general principles of law as administered in the Federal Courts."

It has long been a basic principle of the law of damages that compensation to the injured should equal, but should not exceed, the injury suffered. Thus in *Wicker* v. *Hoppock*, 6 Wall. 94, 99, this Court stated in 1867:

> "The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed."

Cf. *Milwaukee, etc. R. R. Co.* v. *Arms, et al.*, 91 U. S. 489, 492 (1875).

Dow v. *Humbert, et al.*, 91 U. S. 294, 299 (1875) 299 (1875).

The same principle of damages, whether in contract or tort, has often been reiterated since the adoption of the

first valid Employers' Liability Act in 1908.[1] In *Illinois Central R. Co.* v. *Crail*, 281 U. S. 57 (1930), this Court at page 63 pointed out that "the basic principle underlying common law remedies [is] that they would afford compensation only for the injury suffered." Cf. *Standard Oil* v. *Southern Pacific Co.*, 268 U, S, 146, 155 (1925); *Miller* v. *Robertson*, 266 U. S. 243, 257 (1924).

This Court has also established that damage awards in F.E.L.A. cases constitute no exception to this basic principle. In *Chesapeake & Ohio Railway Co.* v. *Kelly*, 241 U. S. 485. this Court held that despite the uncertainties and evidentiary difficulties involved, the future earnings of a deceased employee must be discounted to present value. In holding that a failure to consider the earning power of money would result in an unwarranted windfall to plaintiffs over and above their actual loss, this Court said at page 489:

> "The damages should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased. *Mich. Cent. R. R.* v. *Vreeland*, 227 U. S. 59, 70 71; *American R. R. of Porto Rico* v. *Didricksen*, 227 U. S. 145, 149; *Gulf, Colorado & C. Ry.* v. *McGinnis*, 228 U. S. 173, 175. So far as a verdict is based upon the deprivation of future benefits, it will afford more than compensation if it be made up by aggregating the benefits without taking account of the earning power of the money that is presently to be awarded."

See also: *Chesapeake & Ohio Ry. Co.* v. *Gainey*, 241 U. S. 494; *Gulf, C. & S. F. Ry.* v. *Moser*, 275 U. S. 133.

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[1] The first Employers' Liability Act was established by an act of Congress on July 11, 1906. 34 Stat. 232. This was held invalid in the Employers' Liability Cases, 207 U. S. 463. The Act of April 22, 1908 (35 Stat. 65) was upheld in the Second Employers' Liability Cases, 223 U. S. 1.

This petition involves two important aspects of the relationship between the federal income tax and damage awards under the F.E.L.A. Petitioner submits that the extent to which a jury is apprised of this relationship goes directly to the maintenance or vitiation of the basic principle referred to above and the measure of damages in F.E.L.A. cases. The issue before the court is therefore a federal question of substance. It has never heretofore been decided by this Court.

II.

The court below decided the issue in a manner inconsistent with the basic principle that compensation in Federal Employers' Liability Act cases should equal, but not exceed the extent of injury.

The Employers' Liability Act of 1908 was passed five years prior to the passage of the Sixteenth Amendment and the first valid income tax act in 1913. 38 Stat. 166. Under the 1913 Act, net incomes were subject to a normal tax of only one per cent per annum. There was also included under that Act an additional tax graduated upwards to a maximum of only six per cent per annum for that portion of net incomes in excess of $500,000. Compensation received for personal injuries was not put in any special category, but was included as ordinary income.

Both the tax rates and the tax treatment of compensation for personal injuries differ substantially under the present law, under which, in addition to the normal tax of three per cent per year on all net income, there is also applicable a graduated surtax on the net income of in-

dividuals extending, for example, from $17,220 on net incomes of $38,000 to $150,820 on net incomes of $200,000. Internal Revenue Code, Title 26 U.S.C. §12. Compensation for personal injuries is specifically excluded from gross income and is exempt from taxation, although dividends and other earnings from investments, regardless of source, are included as gross income.[1] As a result of the marked increases in tax rates and substantive changes in the definition of taxable income, it is clear that the effect of the income tax on F.E.L.A. and other personal injury awards has been drastically altered.

The existence of high tax rates is a matter of common knowledge. But the fact that the income tax is not applicable to certain categories of money receipts, such as compensation received for personal injuries, constitutes a technical exception in the Code which is not a matter of such common knowledge. The problem faced by a jury involved in a conscientious attempt to equate an award of damages with actual injuries suffered must be considered in this light, for whenever damages are erroneously re-

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[1] Title 26 U.S.C. §22(b) provides in pertinent part:

"(b) The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

(5) Compensation for injuries or sickness. * * * the amount of any damages received whether by suit or agreement on account of such injuries or sickness, * * *."

Section 22(a) provides in part:

"(a) General definition. 'Gross income' includes gains, profits and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

garded by jurors as taxable, a natural inclination to offset the presumed tax effect will necessarily result in verdicts far in excess of the compensatory award intended.

This aspect of the problem was clearly recognized by the Missouri Supreme Court in *Dempsey* v. *Thompson*, 363 Mo. 339, 251 S. W. 2d 42. The court there announced as a prospective rule that on request, trial courts should give instructions in substantially the following form (251 S.W. 2d 45):

> " 'You are instructed that any award made to plaintiff as damages in this case, if any award is made, is not subject to Federal or State income taxes, and you should not consider such taxes in fixing the amount of any award made plaintiff, if any you make.' "

The practical considerations compelling this conclusion were concisely set forth as follows (251 S.W. 2d 45):

> "Present economic conditions are such that most citizens, most jurors, are not only conscious of, but acutely sensitive to, the impact of income taxes. Under the Federal and State income tax laws of both Arkansas and Missouri the net income of all persons is taxable except such as is specifically exempted. Few persons, other than those who have had special occasion to learn otherwise, have any knowledge of the exemption involved in this case. It is reasonable to assume the average juror would believe the award involved in this case to be subject to such taxes. It seems clear, therefore, that in order to avoid any harm such a misconception could bring about, it would be competent and desirable to instruct the jury that an award of damages for personal injuries is not subject to Federal or State income taxes.
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"Can there be any sound reason for not so instructing the jury? We can think of none. Surely, the plaintiff has no right to receive an enhanced award due to a possible and, we think, probable misconception on the part of a jury that the amount allowed by it will be reduced by income taxes."

In *Hall* v. *Chicago and North Western Ry. Co.*, 349 Ill. App. 175, 110 N. E. 2d 654, the Third Division of the First District of the Illinois Appellate Court, held it proper for defendant's counsel to inform the jury during oral argument that an amount received as compensation for personal injuries is not subject to the income tax. In so holding, the court stated at 110 N. E. 2d 660:

"Why should the truth be withheld from the jury; why should they be allowed to speculate as to whether their award would be subject to income tax? In reaching their verdict, the jury are fixing an amount which, when received by plaintiff, will be adequate compensation for the specific injuries suffered by him, including loss of earnings, pain and suffering, physical disability, and the nature, extent and permanence of the injuries, at the same time taking into consideration, as they may in Federal liability employment actions, mitigation of damages on account of plaintiff's contributory negligence. In reaching their decision, the jury in all likelihood will consider how much of an award the plaintiff will actually get net, not an amount from which income taxes will have to be deducted. If the jury determine that $50,000 is the correct amount, they will presumably award that sum if they feel there will be no income tax; on the other hand, if they believe there is to be an income tax paid on that amount under the law, they will award a much larger sum in the hope that after the

tax has been paid, plaintiff will still be able to retain $50,000." [1]

When consideration is given both to the nature of jurors' reactions to an erroneous conception of the income tax law, as described in these opinions, and to the amount of error in computing awards that can thereby result, as reflected in current tax rates, the simple point, that substantial prejudice to defendants and windfalls to plaintiffs result from the refusal of a proffered instruction on the non-taxability of personal injury awards, becomes belabored by further comment.

But the income tax problem is not resolved by an instruction limited to the non-taxability of the lump-sum award itself.

It is by now axiomatic that in the calculation of damages necessary to compensate for loss of future earnings, the total amount of such future earnings must be discounted to present value, because of the generally recognized fact that lump-sum awards can reasonably be expected to earn interest, dividends or other income throughout the period for which future earnings have been estimated. *Chesapeake & Ohio Railway Co.* v. *Kelly*, 241 U. S. 485, 490; *Chesapeake & Ohio Railway Co.* v. *Gainey*, 241 U. S. 494; *Louisville & Nashville R. R. Co.*

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[1] The principal question decided in this first Hall case involved the income tax matter discussed above. From an order of the Appellate Court remanding the cause with directions to reinstate or restore the judgment, a petition for leave to appeal to the Supreme Court of Illinois was dismissed as premature. On remand, judgment was again entered for plaintiff. On appeal from this second judgment, the Appellate Court of Illinois, First District, First Division, in Hall v. Chicago & N. W. Ry. Co., 1 Ill. App. 2d 552, 118 N. E. 2d 29 again reversed the judgment and remanded the cause on the ground that there was no evidence to support any charges of negligence. From this decision of the Appellate Court, a petition for leave to appeal to the Supreme Court of Illinois has been granted.

v. *Holloway*, 246 U. S. 525, 528; *Gulf, Colorado & Santa Fe Railway Co.* v. *Moser*, 275 U. S. 133, 136. Accordingly, it is incumbent on the jury in determining damages to consider the probable return on any lump-sum award presently invested.

The determination by a jury of the future rate of return on an amount presently invested is necessarily conjectural. Future earnings, whether in the form of interest, dividends or rent, depend on a variety and combination of economic factors, the effects of which no jury is expected to determine with certainty. Indeed this Court has held that any attempt to subject the jury's estimate to "rigid mathematical limitations" constitutes error. *Louisville & Nashville R. R. Co.* v. *Holloway*, 246 U. S. 525, 528. Yet the impossibility of mathematical certainty affords no justification for keeping a jury ignorant of those factors which, although variable, are material to a determination of a future rate of return on an investment made under the circumstances disclosed by the particular case. *Chesapeake & Ohio Ry. Co.* v. *Kelly, supra*, pp. 490-491.

In *Gulf, Colorado & Santa Fe Ry. Co* v. *Moser, supra*, at page 135, this Court held as material error a trial court refusal to instruct the jury to calculate an award on the basis of the 'highest *net* rate" of interest that could be safely earned (emphasis added). Since it is error to refuse to instruct, when requested, that present value should be computed with reference to the "highest net rate" of earnings, it becomes of vital importance to apprise the jury of such information as will minimize conjecture in the determination of the net rate, particularly where needless speculation produces substantial error. It is precisely this type of needless and misleading conjecture which is eliminated from jury deliberations by the second

portion of the instruction here in issue, relating to the taxability of earnings on the presently invested non-taxable damage award.

Having once been properly instructed as to the non-taxability of a personal injury damage award, what lay jury can be safely presumed to recognize the taxability of the earnings of the award.[1] Yet the failure to distinguish between the non-taxibility of money received on an award and the taxability of earnings thereon necessarily prejudices plaintiffs, whose lump-sum award is thereby reduced to the extent that the gross earnings rate rather than the net earnings rate is used as a discount factor.

This problem has received inadequate consideration in state courts. In *Dempsey* v. *Thompson, supra,* at page 46, the Missouri Supreme Court indicated that although a refusal to instruct concerning the non-taxability of the actual personal injury award is material error, it would not consider as error any refusal to inform the jury that earnings from such awards were taxable. The Court dismissed the instruction as being too speculative. In the instant case, the Illinois Appellate Court based its holdings on this issue solely on the authority of the *Dempsey* case (App. 26-27). We submit that the extent of information to be given juries in F.E.L.A. cases regarding the application of the federal income tax will never be resolved by any such summary disposition.

The case cited by the Missouri Court in support of its holding, and similar cases, some of which were cited below by respondent, uniformly involve a separate and entirely inapplicable issue. *Stokes* v. *United States,* 144 F. 2d 82,

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[1] That such earnings are taxable is, of course, uncontroverted here. Title 26 U.S.C. sec. 22(a), *supra.*

87 (2nd Cir.); *Chicago and North Western Ry Co.* v. *Curl*, 178 F. 2d 497, 502 (8th Cir.); *Southern Pacific Co.* v. *Guthrie*, 186 F. 2d 926, 927 (9th Cir.); *Texas & N. O. R. Co.* v. *Pool*, 263 S.W. 2d 582, 590 (Texas Ct. of Civ. App.); *Smith* v. *Pennsylvania R. Co.*, 99 N.E. 2d 501, 504 (Ohio Ct. of App.). In each of these cases it was held that instructions or evidence regarding the deduction of a *specific* amount from future earnings for income tax liability were too speculative and therefore improper.

The latter portion of the instruction offered below, however, consists only of a simple recitation of the applicable law. It contains no direction that any deduction of a specific amount be made from future gross earnings on personal injury awards presently invested. Under the instruction offered, the jury's deliberations are not confined to "rigid mathematical limitations." The sole function and effect is to inform the jury and to remove conjecture concerning the law governing taxability of earnings from investments which are in themselves non-taxable.

The court below summarily disposed of the entire instruction on the stated grounds that the latter portion is too speculative. But once granted the propriety of the first portion, the issue is not whether the second portion is speculative, but rather whether greater or lesser speculation results in the absence of the second portion.

In a frequently cited United States District Court decision, *Cole* v. *Chicago, St. P. M. & O. Ry. Co.*, 59 F. Supp. 443, 445, the trial judge refers to his own assumption that the jury had considered how future earnings might be affected by taxes in determining damages for loss of future earnings. The assumption is a sound one. Jurors, realizing from their own common knowledge and experience the

burden of taxes, may ordinarily be expected to give some weight to this impact in determining the amount of future earnings. This common knowledge and the effect given to it by the jury differ substantially, of course, from the type and effect of an erroneous instruction or evidence tending to reduce the impact of future taxes to mathematical certainty.

But while jurors might also be presumed to have common knowledge concerning the taxability of earnings from funds presently invested, this presumption disappears where the jury has been previously instructed that the invested funds themselves are not taxable. The latter portion of the instruction is therefore essential in order to assure the jury's giving the ordinary consideration it is presumed to give to the effect of future income taxes.

The portion of the proffered instruction found improper in the court below is, of course, one which operates in favor of plaintiffs. It was offered by petitioner, however, neither through inadvertence nor an inexplicable desire to further the cause of adverse litigants. It was offered as being necessary to a complete restatement of the applicable provisions of the Internal Revenue Code, and as a logical and proper corollary to the fundamentally important instruction concerning the non-taxability of the damage award itself. It is inevitable that in future cases plaintiffs for the same reasons will regularly offer the second portion of the instruction.

Eventually there must be an authoritative resolution of the questions of whether the refusal to instruct as to either or both of these provisions of the Internal Revenue Code constitutes material error. The instant petition is undoubtedly unique in the opportunity it presents for the resolution of both issues.

The Court of Appeals for the Seventh Circuit in *Wetherbee* v. *Elgin, Joliet & Eastern Ry. Co.*, 191 F. 2d 302, 309, had occasion to observe as follows:

> "The way the amounts awarded in verdicts in personal injury cases have been rapidly increasing is a matter of concern to all who are interested in a fair and orderly administration of justice."

The Federal Employers' Liability Act was conceived by Congress as a means for railroad employees to recover compensation for actual injuries. To permit this Act to become the instrument by which excessive verdicts are regularly obtained is to pervert the intent of Congress by imposing crushing costs on the railroad industry in no way related to the economic effects of its negligence or alleged negligence.

Certainly the rendering of an instruction concerning the applicability of the income tax to F.E.L.A. personal injury awards is not the entire answer to a hard problem. Yet it is difficult to conceive of a trial procedure which can more effectively eliminate unnecessary conjecture resulting in substantially excessive awards, and at the same time leave unimpaired all legimate rights of plaintiffs.

For the purpose of limiting the effect of the Federal Employers' Liability Act to that originally intended by Congress, petitioner respectfully submits that this Court should hold that the refusal by the trial court of the tendered instruction constitutes material error.

Conclusion.

Wherefore, for the reasons above stated, petitioner prays that this Court issue a writ of certiorari to review and reverse the judgment in this case of the Appellate Court of the State of Illinois, First District.

Respectfully submitted,

Otis Lowell Hastings,
Drennan J. Slater,
400 West Madison Street,
Chicago 6, Illinois,
Attorneys for Petitioner.

Gerald M. Chapman,
Jordan Jay Hillman,
Of Counsel.

APPENDIX.

Opinion of the Appellate Court of Illinois, First District, Third Division.

Mr. Justice Kiley delivered the Opinion of the Court.

This is a suit under the Federal Employers' Liability Act (45 U. S. C. §51 et seq.) by a railroad repairman. Verdict was for plaintiff in the amount of $37,500. Plaintiff remitted $7,500, and judgment was entered for $30,000. Defendant has appealed.

The accident occurred on September 18, 1948. Plaintiff was then sixty-six years old and had been a car repairman for defendant for twenty-eight years. When injured, he was engaged in repairing a grab iron on a box car. He fell from a scaffold.

The scaffold consisted of a wooden horse about ten feet high and several feet wide. The top platform was ten or twelve inches wide. There were five rungs at several levels below the platform. The rungs were about ⅞th of an inch thick. The scaffold or horse was placed near the south end of a steel end box car so that the bent grab iron on the car could be repaired. On each side of the track where the car was placed were concrete walks. Since the grab iron under repair was on the west side of the car end, the scaffold was placed close to the concrete walk west of the rail. The grab iron under repair was the top-most fixed to the car end. It was about 18 inches wide and about 12 feet above the ground. It was bent in toward the car.

The repair work was the joint operation of a fellow workman, using an acetylene torch to soften the grab iron, and plaintiff, using a crowbar to straighten it. Plaintiff's companion worked while seated on the top of the

scaffold. Plaintiff stood on the second rung on the south side of the scaffold. Consequently the scaffold was between him and the car. After the grab iron was heated, plaintiff was told by his co-worker to "pull." He placed the crowbar under the grab iron and attempted to pull the bar upward. It did not bend. He moved the bar and pulled upward again. The bar slipped and plaintiff fell to the concrete walk and was injured.

The issues raised here are whether there was any evidence of negligence sufficient to submit the case to the jury; whether the court erred in instructing the jury and in ruling on admission of evidence; and whether the verdict is excessive.

Plaintiff had the burden of proving that his injury was the result in whole or in part of defendant's negligence or that of its employees. 45 U. S.C. §51; *Payne* v. *Baltimore & Ohio R. Co.*, 351 Ill. App. 186; *Kloetzer* v. *Louisville & N. R. Co.*, 341 Ill. App. 478; *Wilkerson* v. *McCarthy*, 336 U. S. 53.

Defendant was not required to furnish the latest, best or most perfect appliances. The general rule imposes the obligation to furnish reasonably safe equipment suitable for the purpose of the work and where occupations are attended with great and unusual danger, the obligation is to use all appliances readily attainable for the prevention of accidents. *Perryman* v. *Missouri Pac. R. Co.*, 326 Mo. 176, 31 S. W. 2d 4. The rule applied under the F. E. L. A. is that the employer's duty becomes more imperative as the risk increases. *Bailey* v. *Central Vermont Ry.*, 319 U.S. 350; *Cheffey* v. *Pennsylvania R. Co.*, 79 F. Supp. 252 The testimony of experts with respect to safer methods used on other railroads is an evidentiary basis upon which the jury can decide whether the equipment and

method of the railroad was reasonably safe, or whether it should have used safer equipment and methods. *Boston and M. R. R. Co.* v. *Meech*, 156 F. 2d 109; *Palum* v. *Lehigh Valley R. Co.*, 165 F. 2d 3.

Defendant's contention that there is no evidence of negligence on its part is to be tested by the well-known rule applicable in determining whether a jury question was presented by the evidence. *Wilkerson* v. *McCarthy*, 336 U. S. 53; *Walaite* v. *C., R. I. & P. Ry. Co.*, 376 Ill. 59. We shall relate only the testimony favorable to the plaintiff and draw the legal inferences most strongly in his favor: Plaintiff's co-worker was in charge of the work. He made the decision when the grab iron has been heated enough so as to bend easily. After heating the grab iron, he told plaintiff to straighten it. Plaintiff was standing on the ⅞ inch rung on the outside of the scaffold. When he "pulled up," both of his arms were above his head and his elbows were level with his shoulders. In this operation there is nothing to hold on to. Defendant has weekly safety meetings at which safety in repair operations was discussed and explained. Plaintiff had been instructed by his foreman to do the work the way in which he was doing it.

The foregoing evidence tends to prove negligence in defendant's repair method and in directing plaintiff's work.

There is further favorable evidence for plaintiff: The torch which plaintiff's co-worker was using had close to a three foot flame capacity. Usually safety paper, asbestos or tin is used to protect the paint during the grab iron straightening process. A good welder can heat a grab iron

and not disturb the paint. If paint is burned it blisters. No safety shield was used during the instant work and the paint was blistered.

The foregoing is further evidence of negligence on the part of plaintiff's co-worker, since an inference is justified that the paint had been softened and could cause the crowbar to slip.

There is further favorable evidence for plaintiff: Any work which is overhead requires good footing. Other repairmen on other roads did this type of work on ladders which enabled the repairman to stand with one foot on one step several inches wide, and one on another, or to sit while working so there is no worry about footing. Neither the "Great Western" nor the "Milwaukee" Railroads use horses such as the one defendant used when the accident occurred. The "Milwaukee" uses platform ladders with ample foot space. If the "Great Western" uses horses, it uses them cross-wise and lays twelve inch planks so as to provide about twenty inches of standing space.

The foregoing testimony tends to prove defendant did not furnish plaintiff reasonably safe equipment for the work purpose.

We think, therefor, that the question of defendant's negligence was for the jury.

Defendant, to sustain its contention that the equipment was reasonably safe, argues that plaintiff had used this same kind of scaffold for twenty-eight years and had never seen an accident result therefrom. The question is not what equipment defendant furnished, and plaintiff used, customarily, but whether there was evidence that

the equipment and method were not reasonably safe. *C., R. I. & Pac. Ry.* v. *Daugaard,* 118 Ill. App. 67; *Midland Valley R. Co.* v. *Bell,* 242 Fed. 803; *Texas and Pacific Ry. Co.* v. *Behymer,* 189 U. S. 468. This conclusion disposes of the argument with respect to the long use, without accident, of the method employed in straightening the grab iron.

Defendant argues also that it is free of any charge of negligence because it was entitled to assume that defendant would use the equipment in a safe manner. The fact that plaintiff may have stood with greater safety between the car and scaffold "would not completely immunize" defendant from liability if the injury was in part due to its negligence, for plaintiff's contributory negligence would merely diminish damages, not bar recovery. *Wilkerson* v. *McCarthy,* 336 U. S. 53; *Virginian Ry. Co.* v. *Viars,* 193 F. 2d 547. Moreover there is evidence that plaintiff had been instructed to stand where he stood. Also, reasonable men might differ on the question whether standing between the car and the scaffold on the 7/8 inch cross-board, using both hands above the head, would have been an appreciably safer position.

In view of our conclusion with respect to what the evidence favorable to plaintiff tended to show, it follows that we see no merit in defendant's complaint with respect to plaintiff's "summarizing instruction." This instruction summarized the issues. It is not vulnerable to the sole contention made, that the charges of negligence had no foundation in the evidence. It is true that the third charge summarized refers to tools, but is also refers to equipment.

Appendix.

The defendant complains of prejudicial error in the trial court's refusal to give its tendered instruction #22. It was as follows:

> "You are instructed that under the present provisions of the Internal Revenue Code of the United States any amount paid plaintiff by defendant under a verdict of this jury is exempt from the payment of federal income taxes for the year of receipt of said amount, although the amount of any dividends, interest, gain, profit or income derived from any such amount paid plaintiff by defendant under a verdict of this jury would not be exempt from the payment of federal income taxes."

In support of its claim defendant relies on *Dempsey* v. *Thompson*, 251 S. W. 2d 42 and *Hall* v. *Chicago & N. W. Ry. Co.*, 349 Ill. App. 175. In the *Hall* case this Court reversed an order of the trial court granting plaintiff a new trial because the defendant in argument told the jury that whatever plaintiff received by way of verdict was not subject to income tax. That case is not authority for the reversal of a judgment for the failure of a trial court to give this cautionary (*Dempsey* v. *Thompson*) instruction.

We infer from a study of the *Dempsey* case that the refused instruction there did not contain the words following the word "although" in the instant instruction. The instruction in that case and this are not the same, and the question before us is therefore different.

Plaintiff in that case argued that if the jury should be instructed as to the tax exemption it should also be instructed that dividends, etc., derived from investment of the award, would not be exempt. The Missouri Court

said that any reference to the tax liability of future income realized from the investment of the award "would tend to confuse and distract the jury and lead it into speculating on the amount thereof."

We see no merit in the claim with reference to Instruction # 22. The instruction was bad for the reason given by the Missouri Court in striking down the contention made there by plaintiff and referred to in the preceding paragraph. The trial court was justified in refusing to give Instruction #22. It is not necessary, therefor, for us to decide the question of the propriety of instructing the jury with reference to tax exemption of personal injury verdicts.

Error is claimed on the basis of the refusal of the trial court to admit into evidence certain posed photographs showing various hypothetical positions in which the work might have been done. These photographs could not have been offered as real evidence, *Ellis* v. *Flanningan*, 253 Ill. 397; *People* v. *Crowe*, 390 Ill. 294, but merely for the purpose of clarification or for demonstrative purposes. Admission for this purpose is within the discretion of the trial court. *Goodrich* v. *Chicago Great Western Ry. Co*,. 148 Ill. App. 579; *Quincy Gas and Electric Co.* v. *Baumann*, 203 Ill. 295. There has been no abuse of discretion in this case, since the jury was sufficiently informed by the evidence and photographs already in evidence of the position of the scaffold and the workmen.

Plaintiff's attorney made arguments based upon failure of defendant to supply photographs of the workman doing the work as defendant claims it might have been done. Defendant's attorney answered the argument. No objections were made by either side. The argument was

under control of the trial judge, and there is no showing that there was abuse of discretion in exercising this control. *Reinmeuller* v. *Chicago Motor Coach Co.*, 341 Ill. App. 178.

Defendant contends the verdict is so excessive that a reversal for that reason must be ordered. It says the jury was "fully and fairly instructed on the proper measure of damages" but that the amount of the verdict demonstrates conclusively that the jury gave no heed to the instructions and apparently made no deduction for plaintiff's contributory negligence.

The jury's verdict awarded plaintiff $37,500. Was this amount so excessive as to indicate passion and prejudice on the part of the jury or to indicate that the jury failed to diminish its award for plaintiff's "contributory negligence?" We have shown that the defendant was not prejudiced by any error in the exclusion of evidence or in the giving or refusing of instructions. Moreover we have shown that the jury may have decided that plaintiff was not negligent. Plaintiff's actual loss of earnings to the time of trial was more than $10,000. In addition to being instructed that actual loss of earnings was a proper element of damage, the jury was told that additional elements were the present value of plaintiff's loss of future earnings, pain and suffering, and physical injuries including permanent disabilities resulting from the injuries.

The accident occured in September, 1948 when plaintiff was sixty-six years old. There is evidence that he was hospitalized for two months where his arm from wrist

to elbow was put in a cast, he had a whistling in his head and was given heat treatment for his back; that up to the trial of the case in October, 1952 he had not been able to walk without support for his back; that as a result of his fall he had suffered a fracture of the larger wrist bone at the joint and fracture of the sacrum; that the fractures of four ribs and a dislocated vertebra could have been caused by the fall; that the back injury could be responsible for his permanently stiff back and for the deficiencies in plaintiff's achilles and patilla reflexes; that the reflex deficiences are permanent; that plaintiff used a cane eight or nine months after leaving the hospital, that he has whistling in his head all the time, cannot sleep well, must be given hot baths several times weekly and must spend about three hours daily in bed; that he has lost his appetite; and that since the accident he has lost more than twenty pounds.

Other testimony was that the vertebral injury could have preceded the injury; also that it did precede the injury; that there was enough arthritis to stiffen the back aside from the injury; that all rib fractures were healed at the time of trial; that plaintiff did not complain of the whistling in the head at the hospital; and that plaintiff was given a permit to return to work in January, 1949, though the doctor did not know what work plaintiff was engaged in.

Assuming that the jury took as true the testimony favorable to plaintiff, we think reasonable men could differ on the question of excessiveness. *Smith* v. *Illinois Central Railroad Co.*, 343 Ill. App. 593.

The trial court presumably thought the verdict was excessive by $7,500 but saw no reason to grant a new trial if plaintiff remitted that amount of the verdict. We cannot say that this ruling was insufficient to assure defendant a fair verdict.

For the reasons given the judgment is affirmed.

Judgment Affirmed.

FEINBERG, P. J. and LEWE, J. CONCUR.

No. 46055

JOHN MARGEVICH,

Appellee,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Appellant.

Appeal from Cook Superior. Error to

JUDGMENT.

On this day came again the said parties, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective; and that in the record there is no error:

THEREFORE, it is considered by the Court that the judgment aforesaid, be AFFIRMED in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the Court that the said Appellee recover of and from the said Appellant his costs, by him in this behalf expended, to be taxed, and that he have execution therefor.